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08-261

No. _____

IN THE

Supreme Court of the United States

WALTER JAMES FEHNEL, JR.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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PETIION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether Police Motor Vehicle Checkpoint stops lacking in probable cause are unreasonable searches and seizures which violate the Fourth Amendment to the United States Constitution requiring that *Michigan Dept. of State Police* v. *Sitz*, 496 U.S. 444, 110 L. Ed. 2d 412, 110 S. Ct. 2481 (1990) be overruled.

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The Petitioner, Walter James Fehnel, Jr., respectfully petitions for a Writ of Certiorari to review the denial by the Pennsylvania Supreme Court of Petitioner's Petition For Allowance of Appeal filed on July 13, 2007.

OPINIONS BELOW

On March 20, 2008, the Supreme Court of Pennsylvania denied Petitioner's Petition For Allowance of Appeal without opinion on March 20, 2008. The Supreme Court Order (A-1) is cited at 2008 Pa. 255, __ A.2d __ (2008). Said Petition was based on the unpublished Non-Precedential Decision of the Superior Court of Pennsylvania (B-1) on June 13, 2007 as cited at 2007 Pa. Super 2738, 931 A.2d 43 (2007) which affirmed the Judgment of Sentence (E-1) issued by the trial court on March 27, 2006 and Order (D-1) issued by the trial court on April 27, 2006.

STATEMENT OF JURISDICTION

On March 20, 2008, The Supreme Court of Pennsylvania entered its Order for which Petitioner seeks the Writ of Certiorari.

This Court has jurisdiction to review this case under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

At approximately 1:37 a.m. on October 3, 2004, Mr. Walter J. Fehnel, Jr., Petitioner, was stopped by Officer T. Myers of the York Area Regional Police Department on the 200 block of West Market Street (Route 462) in the City of York, Pennsylvania at a "Targets of Opportunity" Sobriety Checkpoint conducted by the York Area Regional Police Department and the City of York Police Department. After the initial interrogation, the Petitioner

submitted to several field sobriety tests conducted by Officer R. Blymier of the York City Police Department. Petitioner was subsequently arrested and later charged with Driving After Imbibing[1] by Criminal Complaint dated October 19, 2004.

A Hearing was held on Petitioner's Pre-Trial Motion raising several issues including the constitutionality of checkpoints in general and this checkpoint specifically in the Court of Common Pleas of York County, Pennsylvania on May 3, 2005 and concluding on August 23, 2005.

The "Targets of Opportunity" Sobriety Checkpoint on October 3, 2004 was coordinated by the Center of Traffic Safety (Center) which is located in York, Pennsylvania and Lieutenant E. Fells of the York City Police Department.[2] The Center was to determine the location and time of the checkpoint

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[1] 75 Pa.C.S. § 3802.
[2] Transcript of Proceedings, August 23, 2005 at 30.

based on information on alcohol related crashes and where and when they occur which is given to the Center by the Pennsylvania Department of Transportation.[3]

The data used to determine the time and location of the checkpoint, conducted in 2004, was gathered from statistics in the years from 1997 through 2001. As objected to by counsel for the Petitioner, the Commonwealth of Pennsylvania submitted testimony as to Route 462 generally being a targeted roadway for its past incidence of alcohol related crashes.[4] However, there was no evidence presented on which section of the thirty miles of Route 462 traversing York County, Pennsylvania had the most alcohol related crashes or whether any

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[3] *Id.* at 29.
[4] Transcript of Proceedings, May 3, 2005 at 30.

actual location in the vicinity of the checkpoint had a high incidence of alcohol related crashes.[5]

On January 20, 2006 the Honorable Judge Stephen P. Linebaugh, York County Court of Common Pleas, Pennsylvania found the Petitioner not guilty of being incapable of safe driving under Section 3802 (a)(1) of the Pennsylvania Motor Vehicle Code[6] and guilty of Section 3802 (c) of the Pennsylvania Motor Vehicle Code[7] for having a 0.16 Blood Alcohol Content (BAC) or greater at the time of driving. Petitioner was sentenced on March 27, 2006 and filed a timely Notice of Appeal on April 25, 2006 raising the constitutionality of checkpoints.

The Superior Court of the Commonwealth of Pennsylvania heard oral argument on January 10, 2007 and affirmed the judgment of sentence on June

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[5] *Id.* at 28 -30.
[6] 75 Pa.C.S. § 3802 (a)(1).
[7] 75 Pa.C.S. § 3802 (c).

13, 2007. On July 13, 2007, Petitioner filed a Petition for Allowance of Appeal to the Supreme Court of the Commonwealth of Pennsylvania again raising the constitutionality of checkpoints. The Supreme Court of the Commonwealth of Pennsylvania denied the Petition on March 20, 2008.

REASONS FOR GRANTING THE PETITION

I. Whether Police Motor Vehicle Checkpoint stops lacking in probable cause are unreasonable searches and seizures which violate the Fourth Amendment to the United States Constitution requiring that *Michigan Dept. of State Police* v. *Sitz,* 496 U.S. 444, 110 L. Ed. 2d 412, 110 S. Ct. 2481 (1990) be overruled.

The Fourth Amendment, ratified in 1791, states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Slowly, over the centuries, especially in the more recent years, this Country has seen the dilution of the Constitutional guarantee of freedom of an absolute right against the threat of unreasonable intrusion by agents and officials of government into our daily lives. This is more pervasive in the allowance of unwarranted and suspicionless stopping of Americans at sobriety checkpoints as they travel on America's roadways and highways in their vehicles.

Historically, the establishment for the Fourth Amendment, as well as the other nine Amendments in the Bill of Rights, came out of the state constitutional ratifying conventions. The delegates to the Maryland convention said, for example, that

adoption of the Fourth Amendment was necessary because a free people must be provided a constitutional check effective to safeguard our citizens against the issuance of general warrants.[8]

In *Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963) Justice William Brennan said:

> In the celebrated case of *Entick v. Carrington*, 19 Howell's State Trials 1029 (C. P. 1765), Lord Camden laid down two distinct principles: that general search warrants are unlawful because of their uncertainty; and that searches for evidence are unlawful because they infringe the privilege against self-incrimination. Lord Camden's double focus was carried over into the structure of the Fourth Amendment. *See* Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937), 103; Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 366 (1921). The two

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> clauses of the Amendment are in the conjunctive, and plainly have distinct functions. The Warrant Clause was aimed specifically at the evil of the general warrant, often regarded as the single immediate cause of the American Revolution. 373 U.S. at 457.

The early case of *Ex parte Jackson*, 96 U.S. 727 (1877), ruled that Congress had authority to bar material from the postal system. In extended dicta, the decision did not cite the Fourth Amendment when asserting that the government lacked the power to open sealed postal mail, but did implicitly invoke it when the Court wrote that "the constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be." 96 U.S. at 733. The *Jackson* Court also implicitly invoked the Fourth Amendment when it asserted that "regulations excluding matter from the mail

cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter." 96 U.S. at 735.

This Honorable Court's Fourth Amendment decision in *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), held that an order to produce books and papers constitutes a seizure even in the absence of forcible entry into the defendant's house. Again quoting Justice Brennan in *Lopez* he said:

> "The authority of the *Boyd* decision has never been impeached. Its basic principle, that the Fourth and Fifth Amendments interact to create a comprehensive right of privacy, of individual freedom, has been repeatedly approved in the decisions of this Court. Thus we have held that the gist of the Fourth Amendment is "the security of one's privacy against arbitrary intrusion by the police." *Wolf* v. *Colorado*, 338 U.S. 25, 27 [1949]; *Stefanelli* v. *Minard*,

> 342 U.S. 117, 119 [1951]; *Frank* v. *Maryland*, 359 U.S. 360, 362 [1959]." 373 U.S. at 456.

Until the passage of the Fourteenth Amendment in 1868, coverage of the Fourth Amendment only applied to the federal government.[9] *See Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed 652 (1914) (holding that the Fourth Amendment applied only to the federal government.)

In *Wolf v. Colo.*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949) the Court, emphasizing the issue stated that:

> The security of one's privacy against arbitrary intrusion by the police -- which is at the core of the Fourth Amendment -- is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did

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[9] *See* Chandler *et al.*, Constitutional Law Deskbook, Individual Rights, Chapter 3, § 3.3.

> not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.
>
> Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. 338 U.S. at 27-28.

In *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed 652 (1914) the court establishing minimal standards for officials stated:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system

> with the enforcement of the laws. 232 U.S. at 391-392.

See also *Goulded v. United States*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed 647 (1921) (It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly over-zealous executive officers. 255 U.S. at 304); *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed 944 (1928) (Justice Brandeis, dissenting: Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. . . Our

Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. 277 U.S. at 479, 485.); *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) (The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is . . . implicit in the 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. 374 U.S. at 31.)

What was once a constitutional guarantee to be free in our persons and papers from arbitrary intrusion by the police, courts have carved out exception after exception to the Fourth Amendment. *United States v. Robinson*, 414 U.S. 218, 94 S.Ct.

467, 38 L.Ed.2d 427 (1973) upheld a full body search and subsequent arrest for a traffic violation. In dissent Justice Marshall said:

> Indeed, given the fact that mass production of the automobile did not begin until the early decades of the present century, I find it somewhat puzzling that the majority even looks to these sources for guidance on the only question presented in this case: the permissible scope of a search of the person incident to a lawful arrest for violation of a motor vehicle regulation. The fact is that this question has been considered by several state and federal courts, the vast majority of which have held that, absent special circumstances, a police officer has no right to conduct a full search of the person incident to a lawful arrest for violation of a motor vehicle regulation. 414 U.S. at 244.

Justice Marshall further wrote:

> [C]ase-by-case adjudication of Fourth Amendment issues is not only misguided as a matter of principle, but is also doomed to fail as a matter of practical application. As the majority itself is well aware the powers granted the police in this case are strong ones, subject to potential abuse." *Id.* at 248.

> *See* also *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed.374 (1931) (The Fourth Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted.). *See* also *United States v. Humphrey*, 409 F.2d 1055 (10th Cir. Okla. 1969) where the court said: "We are in complete agreement with the prevailing federal and state authority which condemns the search of persons and automobiles following routine traffic violations. Such searches can only be justified in exceptional, on the spot circumstances which rise to the dignity of probable cause. 414 U.S. at 248.

The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. *Chandler* v. *Miller,* 520 U.S. 305, 308, 137 L. Ed. 2d 513, 117 S. Ct. 1295 (1997).

In *Ferguson v. City of Charleston*, 532 U.S. 67,121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) the Court

invalidated a hospital policy setting forth procedures to be followed by hospital staff to identify pregnant patients suspected of drug abuse. Pursuant to the policy, hospital staff members tested pregnant patients for drug abuse and reported positive tests to the police. The Court held:

> While respondents are correct that drug abuse both was and is a serious problem, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *Indianapolis v. Edmond*, 531 U.S. at - (slip op., at 9-10). The Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to such a policy. 532 U.S. at 85 – 86.

If an officer does not have reasonable suspicion that a citizen is involved in illegal activity, he cannot "stop" the citizen, because a stop is a seizure which requires a justification.

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) the court found that the officer had both seized and searched the defendant when the defendant was stopped and, therefore, that the Fourth Amendment applied to the officer's actions. However, the court held that a stop can be conducted if an officer has reasonable suspicion to believe that crime is afoot. 392 U.S. at 30. The court further held that an officer who makes a legal stop can conduct a protective frisk of a suspect if the officer has reasonable suspicion to fear that the suspect is armed and dangerous. 392 U.S. at 30.

The court balanced the nature of the intrusion involved in a stop and frisk with the state interest involved in conducting such an intrusion, and concluded that probable cause was not required for a stop and frisk. Rather, a stop and frisk was reasonable if conducted on the lesser standard of

proof of reasonable suspicion. The court's rationale was that the individual interest at stake in a stop and frisk was less serious than that involved when a suspect is arrested or when a full-scale search is conducted. Unlike an arrest, a stop is a momentary, small-scale intrusion. And unlike a full-scale search for evidence, a frisk is a cursory inspection for weapons. Balanced against these lesser intrusions was the state interest in conducting a stop and frisk.

However, in *N.J. v. T. L. O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) Justice Blackmun, concurring, troubled by the Court's overuse of the balancing test of the Fourth Amendment stated:

> I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable-Cause Clause, only when we were confronted with "a special law enforcement need for greater flexibility." 469 U.S. at 351.

In *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), Justice Stewart proposed that a stop be defined as follows: a person has been "seized" within the meaning of the Fourth Amendment if, in view of all the circumstances, a reasonable innocent person would have believed that he was not free to leave, then a stop has occurred. If the *Mendenhall* test were applied literally, it is arguable that every police-citizen contact would constitute a stop. Very few citizens feel free to walk away from an officer who approaches them to ask questions. Even if an officer does not act coercively, there is an inherent coercive power in the status of an officer, which renders most citizens reluctant to leave the scene. This is especially true when a motorist is "seized" at a vehicle checkpoint.

This carving of the Fourth Amendment does not stop there. In *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), two officers boarded an interstate bus and without articulable suspicion they picked out the defendant and asked him for his ticket and identification. The officers told the defendant that they were on the lookout for illegal drugs and requested the defendant to consent to search his bags. Narcotics were found and the Court held that *Mendenhall's* "free to leave" test could not be applied literally in this instance. The Court stated:

> [R]ather than on the principle that those words were intended to capture. This inquiry is not an accurate measure of an encounter's coercive effect when a person is seated on a bus about to depart, has no desire to leave, and would not feel free to leave even if there were no police present. The more appropriate inquiry is whether a reasonable passenger would feel free to decline the officers' request or otherwise

terminate the encounter. 501 U.S. at 429.

The question, therefore, is when does an average citizen know that he or she is free to leave under any circumstance or decline the officer's requests or otherwise terminate the encounter?

Indeed, the roadblock detention goes further than the stop-and-frisk or field interrogation situation, for here there is the added intimidation of lights, signs and numerous uniformed officers and marked police cruisers conducting an operation that must, by its very nature, have some element of surprise to commuters who are subjected to them. Additionally, there is not even the presence of suspicion upon which the law enforcement officer's action can be founded.

As early as 1925, the judicial branch declared unconstitutional of the seizure of motorists without any probable cause or suspicion of wrong-doing. In

Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925) this Honorable Court observed:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. . . But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. 267 U.S. at 154.

Later, this notion was reaffirmed in *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed1879 (1949) in which the Court noted that it could not be assumed "that any traveler along the public highways may be stopped and searched at the officers' whim, caprice or mere suspicion." 338 U.S. at 177.

The Fourth Amendment requires that searches and seizures be reasonable; Sobriety Checkpoints are just the opposite. There is more than a momentary intrusion upon individuals who are stopped at a roadblock. Every driver is asked for his or her driver's license, registration, proof of insurance, and any other questions the police may have such as: "Do you have any narcotics, paraphernalia, or other contraband in the vehicle?"

Consider this hypothetical: A couple has just finished a private pleasant dinner with a small amount of wine. On the way home in the silent dark of the late evening they suddenly encounter the shock of ultra bright lights and a sign that reads: "Police Sobriety checkpoint ¼ mile ahead. Prepare to stop." At the checkpoint they stop as required and the officers' circle the vehicle shining flashlights into the interior and onto the couple's faces and begin

interrogation. The couple, despite being very aware and able to drive and function quite normally, are terrified considering present Blood Alcohol *per se* laws and in not being able to know what their blood alcohol level might be. They fear whether they can perform acrobatic field sobriety tests and whether if not they will be arrested and jailed for their innocent behavior. The couple is allowed to proceed or perhaps wrongly is not. The police have seized and searched the couple without any evidence that either one has engaged in any criminal activity. This is a clear violation of the Fourth Amendment as the founding fathers authored it.

See Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885, 157 L.Ed.2d 843 (2004) where Justice Stevens, dissenting, remarked on the Illinois checkpoint "Such a seizure may seem relatively innocuous to some, but annoying to others who are forced to wait for several

minutes when the line of cars is lengthened--for example, by a surge of vehicles leaving a factory at the end of a shift." 540 U.S. at 428 – 429.

This Court has had numerous occasions to perform reasonableness balancing when examining the constitutionality of police roadblocks. In *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), the question was whether a roving-patrol border unit constitutionally could search a vehicle for illegal aliens simply because it was in the general vicinity of the border. The *Almeida-Sanchez* Court held that searches by roving patrols could be conducted without consent only if there was probable cause to believe that a car contained illegal aliens. The *Almeida-Sanchez* Court held in *United States v. Ortiz*, 422 U.S. 891 (1975) that the same limitations were applied to vehicle

searches conducted at a permanent border checkpoint.

United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), recognized that other traffic-checking practices involve a different balance of public and private interest and appropriately are subject to less stringent constitutional safe guards. The question there was under what circumstances a roving patrol could stop motorists in the general area of the border for inquiry into their residence status. The Court said that a roving-patrol stop need not be justified by probable cause and may be undertaken if the stopping officer is "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that a vehicle contains illegal aliens. 422 U.S. at 884.

In *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed2d 1116 (1976) for example, this Honorable Court approved suspicionless stops of automobiles near the Mexican border to check drivers' licenses and registrations. This Court held that the public interest in border control outweighed the minimal intrusion on Fourth Amendment liberty. ("The need to make routine checkpoint stops is great, [and] the consequent intrusion on Fourth Amendment interests is quite limited."). 428 U.S. at 577.

Justice White writing for the majority in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) held inadmissible marijuana found by a police officer on the floor of a car he had stopped in order to check the driver's license and car registration. The officer's actions in stopping the car were prompted neither by his observance of a traffic

or equipment violation nor by any suspicious behavior by any of the vehicle's occupants. The Court framed the issue:

> "The question is whether it is an unreasonable seizure under the Fourth and Fourteenth Amendments to stop an automobile, for the purpose of checking the driving license of the operator and the registration of the car, where there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of the vehicle or that either the car or any of its occupants is subject to seizure or detention in connection with the violation of any other applicable law." 440 U.S. at 650.

The *Prouse* Court held that such random stops violate the Fourth Amendment. The *Prouse* Court stated that an individual who drives a car – engaging in a "basic, pervasive and often necessary mode of transportation" – cannot be deemed to have yielded all Fourth Amendment protections. The question is resolved, said the *Prouse* Court, by balancing of the

intensity of the intrusion against governmental necessity. Here the *Prouse* Court decided the marginal contribution which a random license inspection would make to safety did not justify the intrusion involved, particularly in light of the "grave danger of abuse of discretion."

Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) invalidated the seizure of the defendant. In *Brown* two police officers were cruising in a patrol car when they observed the defendant and another man walking away from one another in an alley. The officers stopped their patrol car and exited to question the defendant. The defendant refused to identify himself and asserted that the officers had no right to stop him. The officer replied that he was in a high drug problem area. The officer then frisked him and then arrested the defendant.

The *Brown* Court concluded that reasonable suspicion did not exist on those facts. The sole justification the officers gave for the stop was that the situation "looked suspicious and we had never seen that subject in that area before." 443 U.S. at 49.

The Court stated:

> There is no indication in the record that it was unusual for people to be in the alley. The fact that the appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that the appellant himself was engaged in criminal conduct. In short, the appellant's activity was no different from the activity of other pedestrians in that neighborhood. 443 U.S. at 52.

This Honorable Court has upheld and sanctioned the suspicionless seizure of motorists at vehicle checkpoints away from the border, however, it is here asserted that these checkpoints violate the Fourth Amendment and this Honorable Court must

overturn *Michigan Dept. of State Police* v. *Sitz,* 496 U.S. 444, 110 L. Ed. 2d 412, 110 S. Ct. 2481 (1990).

States cannot show that sobriety checkpoints deter drunk driving. *See* Justice Stevens dissent in *Michigan Dept. of State Police* v. *Sitz,* 496 U.S. 444, 110 L. Ed. 2d 412, 110 S. Ct. 2481 (1990). *See* also *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) where Chief Justice Rehnquist stated:

> "The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 566-567, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976). Roadblock seizures are consistent with the Fourth Amendment if they are "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown* v. *Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979). Specifically, the constitutionality of a seizure turns upon "a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances

> the public interest, and the severity of the interference with individual liberty." (Citations omitted). 531 U.S. at 49.

Three justices in *Sitz* dissented. They opined that the governmental interest in checkpoint program was minimal because the arrests for drunk driving were not shown to be more numerous than could be achieved by deployment of similar law enforcement resources in conventional patrol programs where officers would stop drivers upon probable cause of violation of the traffic code. The dissenters noted that the checkpoints are not permanent, but are fixed at different places on different days, so that drivers have no advanced notice or opportunity to avoid the Fourth Amendment intrusion altogether. The dissenters also observed that the procedures allowed an officer too much discretion to determine which drivers he or she would detain for sobriety checks.

All these cases taken together illustrate the point made by Justice Thomas in *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) that the widely varying balancing tests are afield from what was envisioned in the text of the Fourth Amendment and by its authors and that this Honorable Court must recognize the absolute right against unreasonable searches and seizures as required and defined by the text of the Constitution itself.

In a portion of the dissent in *Sitz* which he wrote separately, Justice Stevens called the checkpoint program "publicity stunts" that serve only a "symbolic" value like the drug testing program condemned by Justice Scalia in his *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) dissent. Justice Stevens concern was that the "most disturbing aspect

of the Court's decision today is that it appears to give no weight to the citizen's interest in freedom from suspicionless unannounced investigatory seizures." 496 U.S. 473. Justice Stevens added:

> [I]t seems evident that the Court today misapplies the balancing test announced in *Brown v. Texas*, 443 U.S. 47, 50 – 51 (1979). The Court overvalues the law enforcement interest in using sobriety checkpoints, undervalues the citizen's interest in freedom from random, unannounced investigatory seizures, and mistakenly assumes that there is "virtually no difference" between a routine stop at a permanent, fixed checkpoint and a surprise stop at a sobriety checkpoint. I believe this case is controlled by our several precedents condemning suspicionless random stops of motorists for investigatory purposes. *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Ortiz*, 422 U.S. 891 (1975), *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) cf. *Carroll v. United States*, 267 U.S. 132, 153 – 154 (1925). 496 U.S. at 462 – 463.

Justice Stevens further added:

> I believe the Court is quite wrong in blithely asserting that a sobriety checkpoint is no more intrusive than a permanent checkpoint. In my opinion, unannounced investigatory seizures are particularly when they take place at night, the hallmark of regimes far different from ours; the surprise intrusion upon individual liberty is not minimal. On that issue, my difference with the Court may amount to nothing less than a difference in our respective evaluations of the importance of individual liberty, a serious albeit inevitable source of constitutional disagreement. On the degree to which the sobriety checkpoint seizures advance the public interest, however, the Court's position is wholly indefensible. 496 U.S. at 468 – 469.

Checkpoints that involve the seizure of law-abiding motorists in the absence of any suspicion of criminality are arguably "the very evil the Fourth Amendment was intended to stamp out." *Samson v. California*, 547 U.S. 843, 858, 126 S.Ct. 2193, 2203, 165 L.Ed.2d 250, 263 (2006) (Stevens, J. dissenting).

City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) invalidated a

drug-interdiction checkpoint where the police stopped and questioned motorists and examined vehicles with a drug-sniffing dog. 531 U.S. at 35. The *Edmond* Court distinguished this narcotics checkpoint from the suspicionless checkpoints it had previously upheld because of the narcotics checkpoint's primary purpose: "the ordinary enterprise of investigating crimes." 531 U.S. at 44. With a seizure designed to advance this traditional law enforcement purpose, the Court "declined to suspend the usual requirement of individualized suspicion," concluding: "we cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." 531 U.S. at 44.

Thus, *Edmond* makes clear that the police cannot institute a checkpoint that pursues general

crime control as its primary purpose. However, the *Edmond* Court noted, "we need not decide whether the state may establish a checkpoint program with the primary purpose of checking licenses or driver sobriety and a secondary purpose of interdicting narcotics." 531 U.S. at 47.

City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000), recognized the real-world impact of broadly sanctioned suspicionless checkpoints on individual privacy interests: "Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." 531 U.S. at 42. The exact meaning of the Court's "primary purpose test" in *Edmond*, therefore, will dictate how far from "routine" suspicionless criminal inquiries in fact will remain.

The *Edmond* Court stressed, however, that "the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." 531 U.S. at 48. Suspicionless checkpoints are evaluated at a programmatic level because, to prove constitutionally reasonable, they must be designed to operate under clear guidelines that constrain the discretion of individual officers executing the checkpoint.

Justice Thomas' dissent in *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) he said:

> Taken together, our decisions in *Michigan Dept. of State Police* v. *Sitz*, 496 U.S. 444, 110 L. Ed. 2d 412, 110 S. Ct. 2481 (1990), and *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976), stand for the proposition that suspicionless roadblock seizures are constitutionally permissible if conducted

> according to a plan that limits the discretion of the officers conducting the stops. I am not convinced that *Sitz* and *Martinez-Fuerte* were correctly decided. Indeed, I rather doubt that the Framers of the Fourth Amendment would have considered "reasonable" a program of indiscriminate stops of individuals not suspected of wrongdoing. 531 U.S. at 56.

The suspicionless stops at "Targets of Opportunity" Checkpoints are made wholesale without probable cause. Consequently, these searches and seizures violate the Fourth Amendment.

The modern jurisprudence of the Fourth Amendment to this point has led the court to a subjective and political balancing of state interests versus individual interests in being free from unreasonable searches and seizures. In fact, checkpoints, like the one conducted in this case, have not and cannot be shown to further any state interest in eliminating highway deaths and mayhem and may

in fact have detracted from the funding and efforts of effective methods to do so, such as roving patrols, training police officers in probable cause, use of technological improvements in the safety of vehicles and in highway and transportation infrastructure and facilitating the training and assistance of drivers to eliminate what no driver wants; that is to drive while intoxicated.[10]

No such balancing analysis can be derived from the Fourth Amendment and all suspicionless searches and seizures like those conducted in carrying out Police "Targets of Opportunity" Checkpoints should be deemed unreasonable and, therefore, contrary to the requirements of the Fourth and Fourteenth Amendments.

The balancing test as enumerated in *Michigan Dept. of State Police* v. *Sitz,* 496 U.S. 444, 110 L. Ed.

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[10] See statistics, http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/STSI/42_PA/2006/42_PA_2006.htm

2d 412, 110 S. Ct. 2481 (1990) cannot be made under the great weight of the Fourth Amendment.

It is respectfully submitted that no politically balanced exception to the Fourth Amendment can or should be contemplated from its language yet made and *Michigan Dept. of State Police* v. *Sitz* must be reconsidered and overruled.

CONCLUSION

For these reasons, it is respectfully submitted that a Writ of Certiorari should be issued to the Supreme Court of the Commonwealth of Pennsylvania to review the question presented by this Petition.

Respectfully submitted,

JOHN G. BERGDOLL
Counsel of Record
Law Offices of John G. Bergdoll
300 West Market Street
York, Pennsylvania 17401
(717) 845-5131
Attorney for Petitioner

Appendix A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent	:	No. 580 MAL 2007
	:	Petition For Allowance of Appeal from the Order of the Superior Court
v.	:	
WALTER JAMES FEHNEL, Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 20th day of March 2008, the Petition for Allowance of Appeal is denied.

TRUE & CORRECT COPY
ATTEST: MAR 20 2008
/s/ Norina K. Blynn
NORINA K. BLYNN
CHIEF CLERK

Appendix B

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P.65.37

COMMONWEALTH OF PENNSYLVANIA,	: IN THE : SUPERIOR : COURT OF : PENNSYLVANIA
Appellee	:
v.	:
WALTER JAMES FEHNEL,	:
Appellant	: No. 800 MDA 2006

Appeal from the Judgment of Sentence of March 27, 2006, in the Court of Common Pleas of York County, Criminal Division at No. CP-67-CR0000046-2005

BEFORE: BENDER, BOWES AND COLVILLE*, JJ.

MEMORANDUM: FILED: June 13, 2007

This case is a direct appeal from judgment of sentence. Appellant raises numerous issues relating to his conviction for driving under the influence of alcohol ("DUI") in violation of 75 Pa.C.S.A. § 3802(c). We affirm.

*Retired Judge assigned to the Superior Court.

Facts

At a DUI checkpoint, police stopped the vehicle Appellant was driving.[1] An officer administered field sobriety tests, several of which Appellant failed. Police transported him to a hospital for a blood draw to determine his blood alcohol content ("BAC"). The test results showed a BAC of 0.208%. He was later charged with violating 75 Pa.C.S.A. § 3802(a) (general impairment) and 75 Pa.C.S.A. § 3802(c) (highest rate of alcohol). Following a nonjury trial, Appellant was acquitted of one count (general impairment) and convicted of the other (highest rate of alcohol). He was sentenced and then appealed to this court.

---

[1] In general, DUI checkpoints are marked, stationary roadblocks where police make suspicionless stops of drivers to check for driving under the influence. By contrast, roving patrols occur when officers patrol roadways to detect impaired driving, making stops based on probable cause. *Commonwealth v. Beaman*, 880 A.2d 578, 579, 580 n.1, 3 (Pa. 2005).

***

Issues Raised by Appellant

I

The trial court issued an order directing Appellant to file a concise statement of matters complained of on appeal under Pa.R.A.P. 1925(b). The docket reveals service, and the date thereof, of this order on Appellant's counsel. Appellant filed a timely 1925(b) statement that included the following issues:

> Whether the roadblock conducted at which Defendant was stopped and the Statutes, including but not limited to Section 3802 of the Pennsylvania Motor Vehicle Code and 6308 of the Motor Vehicle Code authorizing roadblocks and police checkpoints are unconstitutional as violate [sic] of the Constitutions of the United States and of the Commonwealth of Pennsylvania.

Appellant's 1925(b) Statement at 1.

This statement reveals Appellant intends to challenge various statutes as being unconstitutional. A 1925(b) statement that challenges the

constitutionality of a statute without specifying any particular basis for the challenge and without setting forth what previsions of which constitution the statute allegedly offends is a vague statement. ***Commonwealth v. Segida,*** 912 A.2d 841, 844 (Pa. Super. 2006). A vague statement does not comply with Pa.R.A.P. 1925(b) and, therefore, fails to preserve the constitutional claims. *Id.* Appellant's statement does not specify the basis for his constitutional challenge or even the section of a constitution offended. Accordingly, Appellant's first issue is waived.

II

Appellant contends DUI checkpoints are ineffective law enforcement tools. To support his position, he points to pretrial testimony showing there has been no observable trend demonstrating that roadblocks have reduced the number of alcohol-related deaths or that they have produced a change in the number of DUI arrests – i.e., either a decrease in arrests, which would suggest a deterrent effect, or an increase in arrests, which would show that

roadblocks assist law enforcement. Appellant then claims that checkpoints severely interfere with individual liberty. Balancing the claimed ineffectiveness of checkpoints against the claimed severe impingement of personal rights, Appellant concludes that checkpoints are unreasonable and thus violate the federal and state constitutional prohibitions against unreasonable searches and seizures.

To be sure, a stop made at a DUI checkpoint is a seizure for federal and state constitutional purposes. ***Beaman,*** 880 A.2d at 581, 582. The reasonableness of that seizure turns on a three-pronged balancing test in which this Court weighs the gravity of the public interests served by the seizure, the degree to which the seizure advances those public interests, and the severity of the interference with individual liberty. *Id.* at 582.

The public interests that DUI checkpoints intend to serve are the deterrence of drunk driving and the reduction of its hazards such as accident-

related injury and death. *Id.* at 583, 584. These concerns are vital and compelling. *Id.*

In *Beaman*, the Pennsylvania Supreme Court considered statistics comparing the effectiveness of checkpoints with that of roving DUI patrols. *See id.* at 580, 581, 586-89. Those statistics suggested that, when compared to roving patrols, checkpoints required greater manpower-hours and yielded a lower percentage of vehicle-stop arrests. While the comparative statistics in *Beaman* dealt mainly with manpower-hours and percentage of arrests, the testimony on which Appellant here relies relates to alcohol-related deaths and number of arrests. Thus, the evidence in each of the two cases is not exactly of the same type. Nonetheless, the reasoning of *Beaman* controls this matter.

First, as the *Beaman* opinion noted, checkpoints represent only a modest intrusion on privacy and liberty. *Id.* at 583. Thus, we reject Appellant's contention that they severely interfere with personal rights.

Second, one of the reasons the *Beaman* court was not persuaded by the data before it was that the statistics, while showing some inefficiency and/or ineffectiveness of roadblocks, were not overwhelming to the point where the court would substitute its judgment concerning day-to-day law enforcement choices for the reasonable judgments of police and their managers. *Id.* at 588. Additionally, the court observed that the existence of some limited data showing imperfections in roadblocks does not mean they are necessarily ineffectual, *Id.* at 587.

The situation is similar here. The testimony on which the Appellant relies may suggest that checkpoints have not notably improved law enforcement efforts to combat DUI. However, the same testimony suggests that checkpoints have not eroded those efforts, Put another way, checkpoints do have some efficacy. They do facilitate DUI enforcement, although they might not significantly increase the effectiveness police officers would have

if they employed some other reasonable method such as roving patrols. Appellant points to no part of the record persuading us that we should interject our judgment and dictate day-to-day law enforcement choices concerning reasonably effective alternatives to enforce the DUI laws.

In sum, DUI checkpoints advance grave public interests while impinging individual liberty and privacy to a modest extent. Accordingly, Appellant fails to persuade us that such checkpoints are constitutionally unreasonable. His claim thus fails.

***

Summary and Conclusion

Having found all of the issues in Appellant's brief to be waived or without merit, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered:
/s/ James D. McCullough
Deputy Prothonotary
Date: June 13, 2007

Appendix C

IN THE COURT OF COMMON PLEAS OF YORK CO UNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CP-67-CR-0000046-2005
vs.	:	
WALTER J. FEHNEL, JR.	:	

APPEARANCES:

JOSHUA D. BONN, Esquire
Assistant District Attorney
For the Commonwealth

JOHN G. BERGDOLL, Esquire
For the Defendant

1925(a) MEMORANDUM OPINION IN SUPPORT OF ORDER

The Defendant, Walter J. Fehnel, Jr., has appealed the judgment of sentence entered by this Court on March 27, 2006. A Notice of Appeal was filed April 25, 2006.

Pursuant to Appellate Procedure the Court directed the Defendant to file a Concise Statement of

Matters Complained Of on appeal and the Defendant filed the Statement of Matters Complained Of on May 22, 2006

A Criminal Complaint was filed by the Commonwealth on October 13, 2004, charging the Defendant with two counts of Driving Under the Influence alleging to have occurred from an incident on October 3, 2004.

Defendant was charged in Count Number 1 with violating 75 Pa.C.S. §3802(a)(1) and in Count Number 2 with violating 75 Pa.C.S. §3802(a)(2), (b), & (c).

On February 25, 2005, Defendant filed an Omnibus Pre-Trial Motion seeking discovery, seeking to suppress evidence, seeking to quash the Information and Complaint, asking the Court to grant habeas corpus relief, seeking a motion to dismiss the charges against the Defendant, seeking a motion in limine as to incompetent, immaterial, and irrelevant evidence, seeking a motion to consolidate and combine this case with the previous case in which the Defendant had been charged with Driving

Under the Influence, and seeking to have the Defendant admitted into the ARD Program.

The Court took testimony on May 3, 2005, and August 23, 2005.

The Court denied the Defendant's Omnibus Pre-Trial Motion by its Order entered November 7, 2005.

The Defendant waived his right to a jury trial and requested to be tried before a Judge without a jury on December 15, 2005. The non-jury trial was held on January 20, 2006. At the non-jury trial, the Defendant and the Commonwealth stipulated that the Record would be the testimony that was presented at the suppression hearings on May 3, 2005, and August 23, 2005.

Defendant also sought to have admitted into evidence a summary of a toxicologist, Stanley J. Broskey, Ph.D., together with a substantial amount of documents attached to the summary of the testimony of Dr. Broskey. The Commonwealth objected to the admission of the summary of Dr. Broskey's testimony and the attached documents. The Defendant had notified the Commonwealth a

week before the scheduled trial of his intention to file a summary of Dr. Broskey's testimony. Dr. Broskey did not prepare a report and defense counsel indicated that Dr. Broskey refused to appear to testify at the hearing.

The Court held that the summary of the testimony of Dr. Broskey and the attached documentation was not admissible and the Court sustained the Commonwealth's objection to the admission of that summary and the attachments.

The Defendant was found guilty of Count Number 2, Driving Under the Influence.

The issues that have been raised by the Defendant in the Statement of Matters Complained Of were dealt with in the Opinion of the Pennsylvania Supreme Court in *Commonwealth v. Beaman*, 880 A.2d 578 (Pa. Supreme Court 2005). No statement in addition to that set forth by the Pennsylvania Supreme Court in *Beaman* is necessary.

The Clerk of Courts is directed to provide copies of this Memorandum Opinion to Joshua D. Bonn, Esquire, Attorney for the Commonwealth, and

John G. Bergdoll, Esquire, Attorney for the Defendant.

BY THE COURT,

/s/ Stephen P. Linebaugh

Stephen P. Linebaugh, Judge

Date: May 30, 2006

Appendix D

IN THE COURT OF COMMON PLEAS OF
YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: No. CP-67-CR-0000046-2005
vs.	:
WALTER J. FEHNEL, JR.	:

ORDER

On March 27, 2006, the Court sentenced the Defendant to ninety (90) days to six (6) months incarceration with the Defendant serving the first forty-five (45) days in York County Prison and the balance of the sentence on house arrest. Defendant was directed to report to York County Prison on May 1, 2006, unless an appeal to the Pennsylvania Superior Court was filed from the Court's Order.

Defendant filed an appeal to the Pennsylvania Superior Court on April 25, 2006, and therefore the Defendant need not

report to York County Prison until this matter is finally resolved by the appellate courts.

The Clerk of Courts shall provide copies of this Order to Joshua D. Bonn, Esquire, Attorney for the Commonwealth, John G. Bergdoll, Esquire, Attorney for the Defendant, York County Probation Department, and York County Prison Records Department.

BY THE COURT,

/s/ John S. Kennedy
John S. Kennedy, Judge
For Stephen P. Linebaugh, Judge

Date: April 27, 2006

Appendix E

IN THE COURT OF COMMON PLEAS OF
YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: No. CP-67- : CR-0000046- : 2005
VS	:
WALTER J. FEHNEL	:

[SENTENCE]

York, Pa., Monday March 27, 2006

Before Honorable Stephen P. Linebaugh,
Judge

APPEARANCES:

JOSHUA D. BONN, Esquire
Assistant District Attorney
For the Commonwealth

JOHN G. BERGDOLL, Esquire
For the Defendant

* * *

TRANSCRIPT OF PROCEEDINGS

Reported By:
Lynn M. Ziegenfuss, RPR
Official Court Reporter

* * *

PROCEEDINGS

* * *

MR. BONN: Walter Fehnel; Commonwealth versus Walter J. Fehnel, Jr., Case Number 46 CA of 2005. There's an underlying charge of driving under the influence. This is a second offense, third tier.

The Defendant was found guilty at a non-jury trial of driving under the influence. He was found not guilty of driving under the influence, incapable of safe driving. The Commonwealth is requesting a sentence at the statutory minimum, 90 days to six months at the York County Prison and a $1,000 fine.

THE COURT: Good morning, Attorney Bergdoll. Anything you want to add?

MR. BERGDOLL: We are requesting 45 days Out-Mate and 90 days house arrest, due to the lack of aggravating factors in this incident, and my client is partially responsible for the care of his father, who is currently hospitalized, undergoing cancer treatment, and he would like to continue that care. We would also ask that this sentence be deferred for 30 days, due to the likelihood of an appeal.

THE COURT: We will make it April 28th. That is the 30 days.

MR. BERGDOLL: Yes, sir.

THE COURT: -- in the event that you are going t o file an appeal on that date, or we can make it Monday, May 1st. Are you going to file an appeal?

MR. BERGDOLL: Yes.

THE COURT: We will make it Monday, May 1st. That way I'm just thinking with that, the 28th would be the 30 days.

* * *

SENTENCE

In this matter the Defendant is before the Court for sentencing. The Defendant was found guilty at a bench trial in this matter.

The Defendant is hereby sentenced on the charge of driving under the influence to 90 days to six months incarceration in the York County Prison. We impose a fine of $1,500.

The Defendant may serve his sentence of incarceration of 45 days in the York County Prison on the Out-Mate Program followed by 90 days of house arrest with electronic monitoring. The Defendant shall comply with all the requirements of the driving under the influence, as established by the York County Probation Department. He is to pay his fines, fees, and court costs during the term of his supervision.

We will defer the execution of sentence of incarceration until Monday, May 1st, 2006, in order for the Defendant to make an application to the Out-Mate Program.

Furthermore, in the event the Defendant files an appeal t o the Pennsylvania Superior Court, he, of course, need not report to the York County Prison until after that appeal has been determined.

MR. BERGDOLL: We will notify you of the appeal, and may the record reflect that Mr. Fehnel is turning in his license.

* * *

(Whereupon, the proceedings in the above-entitled matter were concluded.)

* * *

* * *

CERTIFICATION

I hereby certify that the proceedings are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

/s/ Lynn M. Ziegenfuss,
Lynn M. Ziegenfuss, RPR
Official Court Reporter

Appendix F

IN THE COURT OF COMMON PLEAS OF
YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: No.CP-67- : CR-0000046- : 2005
vs.	:
WALTER J. FEHNEL, JR.	: Driving : Under the : Influence

APPEARANCES:

JOSHUA D. BONN, Esquire
Assistant District Attorney
For the Commonwealth

JOHN G. BERGDOLL, Esquire
For the Defendant

OPINION

A Criminal Complaint was filed by the Commonwealth on October 13, 004, charging the Defendant with two counts of Driving Under the Influence alleging to have occurred from an incident on October 3, 2004.

Defendant was charged in Count Number 1 with violating 75 Pa.C.S. § 3802(a)(1) and in Count Number 2 with violating 75 Pa.C.S. § 3802(a)(2), (b), & (c).

On February 25, 2005, Defendant filed an Omnibus Pre-Trial Motion seeking Discovery, seeking to suppress evidence, seeking to quash the Information and Complaint, asking the Court to grant habeas corpus relief, seeking a motion to dismiss the charges against the Defendant, seeking a motion in limine as to incompetent, immaterial, and irrelevant evidence, seeking a motion to consolidate and combine this case with the previous case in which the Defendant had been charged with Driving Under the Influence, and seeking to have the Defendant admitted into the ARD Program.

The Court took testimony on May 3, 2005, and August 23, 2005.

The Court denied the Defendant's Omnibus Pre-Trial Motion by its Order entered November 7, 2005.

The Defendant waived his right to a jury trial and requested to be tried before a Judge without a jury on December 15, 2005. The non-jury trial was held on January 20, 2006. At the non-jury trial, the Defendant and the Commonwealth stipulated that the Record would be the testimony that was presented at the suppression hearings on May 3, 2005, and August 23, 2005.

Defendant also sought to have admitted into evidence a summary of a toxicologist, Stanley J. Broskey, Ph.D., together with a substantial amount of documents attached to the summary of the testimony of Dr. Broskey. The Commonwealth objected to the admission of the summary of Dr. Broskey's testimony and the attached documents. The Defendant had notified the Commonwealth a week before the scheduled trial of his intention to file a summary of Dr. Broskey's testimony. Dr.

Broskey did not prepare a report and defense counsel indicated that Dr. Broskey refused to appear to testify at the hearing.

We find that the summary of the testimony of Dr. Broskey and the attached documentation is not admissible and, therefore, sustain the Commonwealth's objection with regard to those matters.

Based upon the transcript and the Record, we find that the Commonwealth has proven Defendant guilty beyond a reasonable doubt on Count Number 2, Driving Under the Influence, but not on Count Number 1, Driving Under the Influence.

An Order consistent with this Opinion will be entered.

BY THE COURT,

/s/ Stephen P. Linebaugh
Stephen P. Linebaugh, Judge

Date: January 24, 2006

IN THE COURT OF COMMON PLEAS OF
YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: No.CP-67-CR-0000046-2005
vs.	:
WALTER J. FEHNEL, JR.	: Driving Under the Influence

APPEARANCES:

JOSHUA D. BONN, Esquire
Assistant District Attorney
For the Commonwealth

JOHN G. BERGDOLL, Esquire
For the Defendant

ORDER

AND NOW, this 24th day of January 2006, Defendant is found Not Guilty of Count Number 1, Driving Under the Influence.

Defendant is found Guilty of Count Number 2, Driving Under the Influence.

The Clerk of Courts is directed to provide copies of this Opinion and Order to Joshua D. Bonn, Esquire, Attorney for the Commonwealth, and John G. Bergdoll, Esquire, Attorney for the Defendant.

BY THE COURT,

/s/ Stephen P. Linebaugh
Stephen P. Linebaugh, Judge

106

No. 08-261 (2)

FILED
SEP 24 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

WALTER JAMES FEHNEL, JR.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Does Petitioner raise a matter meriting review by this Honorable Court where the Pennsylvania Superior Court found Petitioner's issue waived for failure to comply with state appellate procedural rules, specifically finding that Petitioner's statement of the challenged issue was vague because Petitioner did not specify the basis of the constitutional challenge or even the section of a constitution offended?

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Commonwealth v. Segida, ___ Pa. Super ___, 912 A.2d 841 (2006) 4

STATUTE:

28 U.S.C. §1257 1

RULE:

Pennsylvania Rule of Appellate Procedure (Pa.R.A.P.) 1925(b) 3, 4

STATEMENT OF JURISDICTION

On March 20, 2008, the Pennsylvania Supreme Court denied the petition for allowance of appeal filed by Petitioner. Said order constituted a final order and invokes jurisdiction of this Honorable Court pursuant to 28 U.S.C. §1257.

COUNTER-STATEMENT OF THE CASE

On October 3, 2004, police stopped Petitioner's automobile at a roadblock set up to test the sobriety of drivers of vehicles passing through the area. Police identified Petitioner as the driver, observed Petitioner had bloodshot, glassy eyes and slightly slurred speech, and detected a strong odor of alcohol emanating from Petitioner's vehicle. Police removed Petitioner from his vehicle and requested Petitioner to perform several field sobriety tests, which Petitioner failed. Police promptly transported Petitioner to a local hospital for a blood alcohol content test, which confirmed Petitioner's blood alcohol level was .208. On a subsequent date, police charged Petitioner with driving under the influence of alcohol.

Prior to Petitioner's trial, Petitioner filed a lengthy pre-trial motion challenging the constitutionality of Pennsylvania's driving under the influence laws and seeking suppression of all evidence obtained by the Commonwealth. Upon request of the Commonwealth, the trial court ordered Petitioner to clarify his pre-trial issues. Petitioner responded by

raising eleven issues including whether the roadblock in question violated Petitioner's rights under the Pennsylvania and United States Constitutions.

The trial court held a two day pre-trial hearing where Petitioner cross-examined a public safety official who coordinated the implementation of the roadblock. The public safety official relied on statistical data of alcohol-related crashes to predetermine the date, time, and location of the roadblock. The public safety official attended the roadblock to brief police on Pennsylvania law regarding roadblocks and ensure physical compliance with the law. In addition to the testimony of the public safety official, two police officers testified to the factual basis underlying Petitioner's arrest.

On or about January 20, 2006, the parties agreed that the trial court would determine Petitioner's guilt upon review of the record created at the pre-trial hearing. The trial court found Defendant guilty under Pennsylvania's *per se* driving under the influence of alcohol law, which prohibits an individual from having a blood alcohol content of .16 or greater within two hours of driving a motor vehicle. The trial court did not address Petitioner's constitutional arguments. On March 27, 2006, the trial court sentenced Petitioner to a six-month period of intermediate punishment, including forty-five days of county incarceration, ninety days of house arrest, and the balance to be served under county probation supervision.

Petitioner filed a timely notice of appeal. The Superior Court of Pennsylvania affirmed the trial court's judgment of sentence. The Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal. Petitioner's petition for writ of certiorari is the basis of the instant action.

REASONS FOR OPPOSING WRIT OF CERTIORARI

This Honorable Court should not grant Petitioner's writ of certiorari because Petitioner did not preserve the issue he seeks for review. The Superior Court found that Petitioner waived all constitutional challenges because Petitioner failed to comply with the Pennsylvania rules of appellate procedure. Federal courts should not disturb the discretion of a state court where the state court denies relief for failure to comply with a regularly-applied and well-established procedural rule.

When a state court denies relief because a party failed to comply with a regularly-applied and well-established procedural rule, a federal court will not consider that issue. *Ford v. Georgia*, 498 U.S. 411, 423-424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991). Pennsylvania rules of appellate procedure require, upon order of the trial court, that the appealing party serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after entry of such order. Pa.R.A.P. 1925(b).

Failure to comply with this rule may result in waiver of issues. *Id.* The Pennsylvania Superior Court has ruled that a 1925(b) statement that challenges the constitutionality of a statute without specifying any particular basis for the challenge and without setting forth what provisions of which constitution the state allegedly offends is a vague statement. *Commonwealth v. Segida*, ___ Pa. Super ___, 912 A.2d 841, 844 (2006).

The Pennsylvania Superior Court found that Petitioner waived all constitutional issues because Petitioner filed a vague 1925(b) statement. B-10, B-11. The Superior Court's finding was supported by the record. Petitioner filed a timely 1925(b) statement alleging, in part,

> Whether the roadblock conducted at which Defendant was stopped and the Statutes, including but not limited to Section 3802 of the Pennsylvania Motor Vehicle Code and 6308 of the Motor Vehicle Code authorizing roadblocks and police checkpoints are unconstitutional as violate of the Constitutions of the United States and the Commonwealth of Pennsylvania.

The Superior Court found this statement vague because it did not specify the basis of the constitutional challenge or even the section of a constitution offended. Applying *Segida*, the Superior Court held Petitioner's vague statement violated Pa.R.A.P. 1925(b), resulting in waiver of all constitutional claims.

The Commonwealth requests this Honorable Court apply the general rule discussed in *Ford* and deny Petitioner's petition for writ of certiorari. Pennsylvania's rules of appellate procedure are regularly-applied and well-established. Petitioner's failure to comply with the rules prohibited the Pennsylvania appellate courts from addressing Defendant's constitutional claim. The Commonwealth requests that this Honorable Court not allow Petitioner to challenge issues that were not properly preserved before the Pennsylvania Courts.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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